APPENDIX A

NELSON JAMES LEWIS v. COMMONWEALTH OF VIRGINIA.
August 30, 1973

Record No. 8189

Present, All the Justices.
SNEAD, C.J., delivered the opinion of the court.

On July 13, 1972, Nelson James Lewis was tried and convicted on pleas of not guilty by the trial court sitting without a jury on two counts of grand larceny and one count of statutory burglary. He was sentenced to the State Penitentiary for two years on each count for a total of six years. The facts were stipulated, and the sufficiency of the evidence is not contested.

At the time of the commission of the offenses, defendant was 17 years of age. As a result of petitions filed and after hearing evidence relating to the offenses and considering the social study, the Eighth Regional Juvenile and Domestic Relations Court of the City of Charlottesville, in accord with Code § 16.1-176.1 (1960 Repl. Vol.),[1] found and certified that it was in the public interest for the "matter" to be disposed of in that court. The juvenile court also found that "the welfare and best interests of said child requires that the State should assume his guardianship" and ordered Lewis committed to the State Department of Welfare and Institutions.

Within three days after the order of the juvenile court, the Commonwealth's Attorney, pursuant to Code § 16.1-176(a) (1960 Repl. Vol.),[2] gave notice to the juvenile court that he deemed action by a court of record necessary and

[1] Repealed by Acts 1973, c. 440.

[2] § 16.1-176 was amended and reenacted by Acts 1973, c. 440, effective July 1, 1973.

thereafter presented the cases to the grand jury, which returned indictments against Lewis. Motions were made to quash the indictments on the grounds that the court lacked jurisdiction and that a trial would constitute double jeopardy. The motions were denied, and Lewis was tried as an adult in the Corporation Court of the City of Charlottesville. We granted him a writ of error to consider whether the trial court had jurisdiction to try him and whether he was denied due process of law and placed twice in jeopardy for the same offenses.

[1] Lewis argues initially that Code §§ 16.1-176(a) and 176.1 were in conflict and that the trial court had no jurisdiction to try him after the juvenile court found that the "matter" should be disposed of there without certification to the court of record.

Code § 16.1-176.1 provided:

> "If a juvenile sixteen years of age or over, who has been previously committed to any juvenile training school in this State or any other state, is charged with an offense which, if committed by an adult, could be punishable by death or confinement in the penitentiary, the case shall be certified for proper criminal proceedings, if probable cause be found, to the appropriate court of record having jurisdiction of such offense if committed by an adult, unless the juvenile and domestic relations court shall find and shall certify in its order that it is in the public interest for the matter to be disposed of therein."

The record shows that § 16.1-176.1 was applicable to Lewis since he had been previously committed to a juvenile training school, but § 16.1-176(a) provided:

> ". . . [I]n the event the juvenile court does not so certify [for proper criminal proceedings] a child fourteen years of age or over, charged with an offense which, if committed by an adult, would be punishable by death or confinement in the penitentiary for life or a period of twenty years or more, the Commonwealth's attorney of the city or county, if he deems it to the public interest, may present the case to the grand jury of the proper court of record. . . . It shall be the duty of the Commonwealth's attorney to notify the juvenile and domestic relations court within three days after final adjudication if he deems action by the court of record necessary. . . . If the grand jury returns a true bill upon such indictment the jurisdiction of the juvenile court as to such case shall terminate."

The language of the statutes is plain. They should be read and considered together. In so doing, we find that §§ 16.1-176(a) and 176.1 were not mutually exclusive but were complementary and that the trial court had jurisdiction to try the cases after removal from the juvenile court.

[2] Next, Lewis argues that § 16.1-176(a) was unconstitutional on its face as a denial of due process and that the whole proceeding is a nullity. He says that the statute enabled the Commonwealth's Attorney to make an arbitrary, judicial determination to present the case to the grand jury after the juvenile court had decided to treat Lewis as a juvenile. Lewis points out that the 1973 General Assembly recognized the inequity in the statute when it amended § 16.1-176 to require the court of record to make the final determination whether the Commonwealth's Attorney may seek an indictment against the juvenile. His argument seeks to extend to juvenile proceedings the same due process re-

quirements guaranteed in criminal proceedings by virtue of a trend in recent Supreme Court decisions.

Many of the requirements of procedural due process in criminal trials have been declared applicable to juvenile proceedings since *In re Gault*, 387 U.S. 1 (1967). There the Supreme Court held the "essentials of due process and fair treatment" must be followed in juvenile hearings to adjudicate delinquency. Specifically, a juvenile is entitled to adequate notice of the charge, the right to counsel, the right to confrontation and cross-examination of witnesses and the privilege against self-incrimination. *In re Winship*, 397 U.S. 358 (1970), held that proof beyond a reasonable doubt was an essential of due process and fair treatment where a juvenile is charged with act which would be criminal if committed by an adult. *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971), subsequently reaffirmed the applicable due process standard of fundamental fairness in juvenile proceedings but refused to extend the right to trial by jury to state juvenile delinquency proceedings.

We hold that the statutory procedure in § 16.1-176(a) did not violate the due process standard of fundamental fairness and was not unconstitutional on its face. After the Commonwealth's Attorney presented the cases to the grand jury, it was within the discretion of the grand jury to return true bills or not. When the grand jury returned its true bills, the trial court had the discretion to treat the juvenile offender as an adult or as a juvenile (§ 16.1-177), or to transfer the cases back to the juvenile court for disposition (§ 16.1-175).

[3] Finally, Lewis contends that he was placed twice in jeopardy for the same offenses in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 8 of the Constitution of Vir-

ginia. The determinative question presented is whether he was placed in jeopardy in the juvenile proceeding.

As has been noted, recent Supreme Court decisions have changed the approach the States must take to some aspects of juvenile proceedings. Virginia had adhered to the *parens patriae* concept of juvenile justice, in which juvenile proceedings were for the protection of the child and society. Such proceedings were considered of a civil nature and were not criminal. *Cradle* v. *Peyton,* 208 Va. 243, 251, 156 S.E.2d 874, 878 (1967) *cert. denied,* 392 U.S. 945 (1968); *Jones* v. *Commonwealth,* 185 Va. 335, 342, 38 S.E.2d 444, 447 (1946).

In *Cradle* we said, "[t]he *Gault decision* requires a change in this concept of juvenile proceedings as non-criminal, a change from procedures . . . that were founded on honest concern for the welfare of the child." 208 Va. at 249; 156 S.E.2d at 878. *Cradle* was decided prior to *Winship* and *McKeiver.* In light of these subsequent decisions, together with *Gault,* we do not think a complete reappraisal of Virginia's juvenile court concept is required.

Gault regarded proceedings to determine delinquency which might lead to commitment as "criminal" for the purposes of the privilege against self-incrimination and cast doubt on the distinction between civil delinquency hearings and criminal trials in other areas. 387 U.S. at 49-50. *Winship* also cast doubt on that distinction. 397 U.S. at 365-66. *McKeiver* added that "the juvenile court proceeding has not yet been held to be a 'criminal prosecution' . . . and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label." 403 U.S. at 541. However, in *McKeiver,* the court concluded:

> "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court

> system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it." 403 U.S. at 551.

We adhere to our earlier view that juvenile proceedings are civil and that jeopardy does not attach in such proceedings to bar subsequent prosecution on a grand jury indictment. *Accord, State* v. *R.E.F.*, 251 So.2d 672 (Fla. App. 1971), aff'd, 265 So.2d 701 (Fla. 1972). In so holding, we are not unmindful of the distinction made between a juvenile commitment order and a juvenile certification order in *Cradle* v. *Peyton, supra*, and *Brown* v. *Cox*, ... F.2d ..... (4th Cir. 1973). We find, however, that Lewis was not denied the "essentials of due process and fair treatment" when his cases were removed to the court of record for a criminal trial after commitment by the juvenile court.

The convictions appealed from will be.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

Civil Action Number 73-C-25-C

Nelson James Lewis,
Petitioner

vs.

James F. Howard, Director, Division of Corrections and
K. R. Purvis, Superintendent,
Respondents

OPINION AND JUDGMENT

By: Ted Dalton, United States District Judge

On May 30, 1972, proceedings were initiated against the petitioner, then seventeen years old, in the Eighth Regional Juvenile and Domestic Relations Court of the City of Charlottesville, Virginia, on two charges of grand larceny and on another charge of feloniously breaking and entering a dwelling in the nighttime with the intent to commit larceny therein. At a hearing held on June 9th the petitions were determined to be true and on June 16th, pursuant to § 16.1-176.1[1] of the Virginia Code, the Juvenile Court certified that it was in the public interest for the matter to be disposed of in a juvenile proceeding. Consequently, the Juvenile Judge determined that the welfare and best in-

terests of the petitioner required that the State should assume his guardianship and ordered that petitioner be committed to the State Department of Welfare and Institutions for an indeterminate period not to exceed his 21st birthday. The Assistant Commonwealth's Attorney for the City of Charlottesville, pursuant to § 16.1-176(a)[2] of the Virginia Code, notified the Juvenile Judge that he deemed action by the court of record necessary, and therefore intended to seek a grand jury indictment. Upon submission to a grand jury, the petitioner was indicted for offenses identical to those considered in the juvenile proceeding and was convicted in an adult criminal proceeding on July 13, 1972, and sentenced to six years imprisonment in the state penitentiary.

Herein, the petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his conviction on two grounds. Initially, he asserts that § 16.1-176(a) of the Virginia Code, which permits the Commonwealth's Attorney to certify a juvenile over the age of fourteen years to a grand jury in the event the juvenile court does not certify, where the juvenile is charged with an offense which, if committed by an adult would be punishable by death or confinement in the penitentiary for life or for a period of twenty years, is violative of the due process provisions of the Fifth Amendment and the due process and fundamental fairness provisions of the Fourteenth Amendment. In response, the State argues petitioner has failed to exhaust his available state court remedies with regard to this contention. Since petitioner's second contention is determinative of this controversy, the court does not reach the exhaustion question, nor the issue proffered by petitioner's allegation.

In his second allegation, petitioner contends that his trial and conviction as an adult in the Corporation Court of the City of Charlottesville after the Juvenile Court's commit-

ment order was in violation of the Fifth Amendment prohibition against double jeopardy. The State, in its motion to dismiss, admits that petitioner has presented this claim to the Supreme Court of Virginia, consequently, petitioner has exhausted his state remedies and this issue is ready for disposition.

Hisorically, a juvenile court proceeding succeeded by an adult conviction for the same offense has not been constitutionally defective. Juvenile proceedings have been viewed as civil, rather than criminal in nature, and thus, no jeopardy attached to any proceeding in the juvenile court. Numerous courts, however, have realized that this distinction is often artificial, and have increasingly recognized the need to insure that the fundamental elementals of due process are accorded juveniles.

Three recent Supreme Court decisions have greatly expanded the rights of juveniles in juvenile court proceedings, (*Kent* v. *U.S.*, 383 U.S. 541 (1966)) (procedural due processs required in waiver proceedings); *In Re Gault*, 387 U.S. 1 (1967) (juvenile has the right to notice of the charge, right to counsel, right to confront witnesses and right against self-incrimination); *In Re Winship*, 397 U.S. 358 (1970) (requirement of proof beyond a reasonable doubt during the adjudicatory stage of juvenile proceedings), nonetheless, not all rights constitutionally assured to an adult accused of crime also are to be enforced in a delinquency proceeding. *E.g.*, *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971) (guarantee of a jury trial is not applicable in juvenile proceedings).

The prohibition against double jeopardy is a constitutional provision which the Supreme Court has not yet held applicable to juvenile proceedings. Several courts, nevertheless, have invalidated subsequent adult convictions finding violation of the fundamental fairness and due process re-

quirements of the Fourteenth Amendment. These cases, however, involved extraordinary circumstances not present in this controversy. *E.g., Heltin* v. *Beto,* 396 F.2d 216 (5th Cir. 1968); *Sawyer* v. *Hauck,* 245 F.Supp. 55 (W.D. Tex. 1965); *Garza* v. *State,* 369 S.W.2d 36 (Crim. App. Tex. 1963).

Furthermore, several state courts have ruled that a juvenile adjudicatory proceeding exposes the juvenile to jeopardy so that a subsequent adult proceeding for the same offense constitutes double jeopardy in violation of the Fifth Amendment. *M.* v. *Superior Ct.,* 93 Cal. Rptr. 752, 482 P.2d 664 (1971); *State* v. *Gibbs,* 94 Idaho 908, 500 P.2d 209 (1972); *Collins* v. *Texas,* 429 S.W.2d 650 (Tex. Ct. Civ. App. 1968). Additionally, the U.S. District Court for the District of Columbia has held the 5th Amendment prohibition against double jeopardy applicable to juvenile proceedings. *U.S.* v. *Dickenson,* 168 F.Supp. 899 (D. D.C. 1959). Although the Court of Appeals for the District of Columbia reversed because only a preliminary hearing had been conducted in order to set a date for trial if the allegations of the petition were denied or to continue the case pending completion of a full social study and recommendations, the opinion implied that had the juvenile proceeding reached the stage at which the juvenile's liberty had been placed in jeopardy the lower court opinion would have been upheld. 271 F.2d 487, 490 (D.C. Cir.1959). Several months ago, the Fifth Circuit Court of Appeals ruled, in a situation analogous to petitioner's, that criminal prosecution of a juvenile after an adjudication and commitment in a juvenile proceeding violates the former jeopardy clause of the fifth Amendment. *Fain* v. *Duff,* No. 73-1933 (5th Cir., Dec. 7, 1973).

Our Court of Appeals appears ready to adopt a similar position. In an opinion rendered on June 28, 1973, the

Fourth Circuit considered the applicability of the double jeopardy clause to juvenile court proceedings. *Brown* v. *Cox,* 481 F.2d 622 (4th Cir. 1973). In denying the Virginia prisoner's habeas petition, the Court stressed the distinction between a "transfer or certification proceeding and an adjudicatory or dispositional proceeding" in juvenile court. The Court declared:

> It should be emphasized that in the case under appeal there was no adjudication in the Juvenile Court imposing confinement or restraint on the petitioner. *Of course, had that court taken jurisdiction of the petitioner's offense for final disposition and made an adjudication of commitment or confinement, it might be said that, under the test established in McKeiver, jeopardy would attach and a later prosecution of the juvenile as an adult in criminal court would violate "fundamental fairness."* A number of cases have so held. But that was not the course of proceedings in the Juvenile Court in this case. The petitioner, after a hearing, was transferred to the Corporation Court and it was that latter Court which alone made an adjudication of petitioner's guilt and imposed punishment on him.

481 F.2d at 630. (emphasis supplied).

The juvenile proceeding involving petitioner was quite different from that in *Brown.* In *Brown,* the juvenile court waived its jurisdiction pursuant to § 16.1-176, certifying the juvenile for adult criminal proceedings without reaching the adjudicatory or commitment stage. Conversely, the petitions against petitioner were adjudicated to be true and he was committed to the State Department of Welfare

and Institutions. This determination authorized the imposition of significant restrictions on petitioner's liberty, as would any commitment order in a juvenile proceeding. Although a decree finding a child within the purview of the juvenile law may result in the juvenile being allowed to return to his home, it may also result in incarceration until age 21. § 16.1-178. A commitment order, therefore, exposes the juvenile to jeopardy. To permit the State, as it did in petitioner's case, to subject the juvenile to a plenary juvenile procedure resulting in his commitment to a juvenile agency, and then indict and prosecute him as an adult would be fundamentally unfair. See 403 U.S. at 547, 550-51.

Additionally, the imposition of this constitutional requirement will not disrupt the juvenile court system. *See Id.* In 1973 the State legislature rewrote § 16.1-176, significantly altering Virginia juvenile court procedure. In petitioner's proceeding, the Charlottesville Juvenile Court did not rule on whether to retain jurisdiction or certify petitioner for criminal proceedings until the hearing on June 16, 1972, during which it also issued its commitment order. Today this could not occur, for prior to hearing evidence on the merits, the juvenile court is required to conduct a hearing on whether the juvenile should be transferred to a court of record or retained within the jurisdiction of the juvenile court. § 16.1-176(a)(2). If the juvenile court decides to retain jurisdiction, the Commonwealth's Attorney may, within three days of this determination, notify the court of his intention to seek removal to the proper court of record, which shall, within ten days of receipt of the records, enter an order either remanding the case to the juvenile court or advising the Commonwealth's Attorney that he may seek an indictment. If the grand jury returns a true bill the jurisdiction of the juvenile court is terminated.

§ 16.1-176(e). Consequently, the problem of double jeopardy has been eliminated. Once the Commonwealth's Attorney indicates his intention to seek an indictment the juvenile proceeding is halted before reaching the commitment stage. If the Commonwealth's Attorney is successful, the juvenile is exposed initially to jeopardy in an adult proceeding. If not, the juvenile proceeding continues with the juvenile confident that the discipline imposed will result only from the juvenile proceeding.

For the aforementioned reasons the court finds that petitioner's constitutional rights were violated since he was twice placed in jeopardy. Petitioner's application for a writ of habeas corpus is therefore granted and his conviction in the Corporation Court of the City of Charlottesville, Virginia on July 13, 1972 nullified. However, since petitioner's juvenile proceeding was proper and as he is not yet 21 years old, the commitment order of the Eighth Regional Juvenile and Domestic Relations Court of the City of Charlottesville remains effective. Petitioner, therefore, is within the care and custody of the State Board of Welfare and Institutions.

The clerk is directed to send a certified copy of this opinion and judgment to the petitioner and to counsel for respondent.

Enter:

/s/ Ted Dalton

United States District Judge
April 3rd, 1974

FOOTNOTES

1. This section, which was repealed in 1973, provided:
If a juvenile sixteen years of age or over, who has been previously committed to any juvenile training school in t[illegible] State or any other state, is charged with an offense which if comm[illegible]d by an adult, could

be punishable by death or confinement in the penitentiary, the case shall be certified for proper criminal proceedings, if probable cause be found, to the appropriate court of record having jurisdiction of such offense if committed by an adult, unless the juvenile and domestic relations court shall find and shall certify in its order that it is in the public interest for the matter to be disposed of herein.

2. At the time of petitioner's hearing this section provided:

(a) If a child fourteen years of age or over is charged with an offense which, if committed by an adult would be punishable by confinement in the penitentiary the court after an investigation as prescribed in paragraph (b) of this section, and hearing thereon may, in its discretion, retain jurisdiction or certify such child for proper criminal proceedings to the appropriate court of record having criminal jurisdiction of such offenses if committed by an adult; provided, however, that in the event the juvenile court does not so certify a child fourteen years of age or over, charged with an offense which, if committed by an adult, would be punishable by death or confinement in the penitentiary for life or a period of twenty years or more, the Commonwealth's attorney of the city or county, if he deems it to the public interest, may present the case to the grand jury of the proper court of record, and provided further that if a child fourteen years of age or older who has previously been adjudged to come within the purview of the juvenile and domestic relations court law for committing an offense indicating a viciousness of character, or an offense which, if committed by an adult would be punishable by confinement in the penitentiary and is subsequently charged with committing a felony, the Commonwealth's attorney of the city or county, if he deems it to be in the public interest, may, after a preliminary hearing in the juvenile and domestic relations court, present the case to the grand jury of the proper court of record. It shall be the duty of the Commonwealth's attorney to notify the juvenile and domestic relations court within three days after final adjudication if he deems action by the court of record necessary. Thereafter, the decision as to whether or not to present the case to the grand jury shall be in the sole discretion of the juvenile and domestic relations court. If the grand jury returns a true bill upon such indictment the jurisdiction of the juvenile court as to such case shall terminate.

The section was rewritten in 1973. One of the changes requires the Commonwealth's attorney to obtain the approval of the proper court of record prior to seeking a grand jury indictment.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1568

Nelson James Lewis,

Appellee,

versus

James F. Howard, Director, and K. R. Purvis, Supt., Southampton Farm,

Appellants.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. Ted Dalton, District Judge.

Argued October 4, 1974. Decided November 4, 1974.

Before Boreman, Senior Circuit Judge, and Winter and Widener, Circuit Judges

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Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, (Andrew P. Miller, Attorney General of Virginia, on brief) for Appellants; L. B. Chandler, Jr., (Chandler and Huff on brief) for Appellee.

Per Curiam:

Nelson James Lewis, then seventeen years old, was tried and convicted as an adult in the Corporation Court of the City of Charlottesville, Virginia, after he had been committed to the Department of Welfare and Institutions by the Juvenile and Domestic Relations Court of the City of Charlottesville. Lewis filed his petition in the district court for a writ of habeas corpus and the court granted the writ, holding that the trial and conviction of Lewis as an adult in the Corporation Court was in violation of the Fifth Amendment prohibition against double jeopardy.[1]

Upon consideration of the record, briefs and arguments of counsel we affirm on the opinion of the district court.

Affirmed.

[1] Lewis v. Howard, 374 F.Supp. 446 (D.C. W.D. Va. 1974).